No. 114.

Brief of Mackey for Appts.

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JAMES H. McKENNEY
CLERK

Supreme Court of the United States,

OCTOBER TERM, 1897.

Filed Nov. 1, 1897.

FANNIE P. WILLIAMS ET AL.

v.

JOHN W. PAINE ET AL.

No. 114.

On Appeal from a Decree of the Court of Appeals of the District of Columbia.

BRIEF FOR PLAINTIFFS,

APPELLANTS.

FRANKLIN H. MACKEY,
Solicitor for Appellants.

WASHINGTON, D. C.:
GIBSON BROS., PRINTERS AND BOOKBINDERS.
1897.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1897.

FANNIE P. WILLIAMS ET AL., APPELLANTS,

v.

JOHN W. PAINE ET AL., APPELLEES.

No. 114.

Brief for Appellants.

This is a bill (amended bill, Rec. 16) filed to obtain a partition or sale of square fifty-three (53), in the District of Columbia, in which the plaintiffs claim a one-sixth undivided interest in fee simple. The facts of the case are as follows:

George W. Peter, being seized, as the plaintiffs allege, in fee simple of said square, conveyed the same, together with other real estate, on the 23d of January, 1837, to Henry Huntt and Benjamin Ogle Tayloe in fee as tenants in common (Rec. 68). Henry Huntt died shortly afterward,—September, 1838,—leaving as his heirs at law his three children, Mary Huntt (afterwards Mary Ransom),

Fannie Huntt (afterwards Fannie Gibson), and George Gibson Huntt, to whom said land descended equally. On the 23d of May, 1859, Mary, who had in the meantime intermarried with Robert Ransom, Jr., joined with her husband in executing a certain instrument of writing purporting to give to George G. Huntt a power of attorney to control, manage, bargain, sell, and in that event to convey, &c., all their right, title, and interest in said land. This instrument is set forth in the record, at p. 21, as Exhibit J. A. L. No. 1. At the time of executing this paper Robert Ransom was an officer in the army of the United States, but on the breaking out of the war between the States he resigned his commission and was appointed an officer in the army of the Confederate States. He engaged actively in the war and soon rose to the rank of major-general.

In the summer of 1864 Walter S. Cox, now one of the judges of the supreme court of this District, but then practising law in Washington, was in correspondence with his relative, Mrs. Gibson, and "at her immediate request" undertook to find a purchaser for this square and the other lots of ground of which the Huntt heirs were seized as tenants in common with Benjamin Ogle Tayloe. He effected a sale, through a broker, to Tayloe. In his letter to Mrs. Gibson of July 27, 1864, offered in evidence by the defendants, he says (Rec. 51):

"DEAR FANNIE: Mr. Tayloe has furnished me a statement showing—

Payment of taxes by him amounting to....	$199 27
Which deducted from.....	2,500 00
Leaves a balc. of.....	$2,300 73

"Each share of this—one-third—would be $766.91. I thought he would pay one-half to you on receiving your deed, & the balc. to Gibson; but he thought it better,

and he is perhaps right, to pay each one of you his or her share *on receiving the deed from each.* He has therefore paid me your share and given me an authority on Mr. Riggs to pay the rest *on receiving the deeds.* This will relieve you of any responsibility *as to Minnie's* [Mary Ransom's] *share.* I suppose you would be rather embarrassed about disposing of it, and she can do what she pleases with it *when the war is over*," &c.

On November 26, 1864, he writes Mrs. Gibson (Rec. 51) that Mr. Tayloe "has agreed to pay Minnie's share as soon as Gibson will execute a formal *contract of sale*, in pursuance of the power of attorney from her and her husband. I enclose a paper, attached to the power of attorney, which he should execute in the same way as his deed, and as soon as I receive it I will send you Minnie's share."

Gibson Huntt was at that time an officer in the United States army. On receipt of the contract of sale referred to in this letter he executed it and it was returned to Washington, where it was recorded, and the money was remitted to Mrs. Gibson, who testifies (Rec. 39) that "it was all expended at her [Mary Ransom's] direction or turned over to her." She does not think she sent her any during the war and "never spoke to her on the subject" of the property. There is no evidence in the record that Mrs. Ransom ever knew the property was sold. The contract of sale executed by Gibson Huntt is set forth on page 23 of the record, and is as follows:

"Know all men by these presents, that I, George Gibson Huntt, by virtue of the annexed power of attorney to me from Robert Ranson, Jr., and Mary Ransom his wife, and for the consideration of the sum of eight hundred and twenty-three $\frac{33}{100}$ dollars to me in hand paid by Benjamin Ogle Tayloe, of the city of Washington, in the District of Columbia, receipt of which is hereby acknowledged, have bargained and sold to said B. O. Tayloe, his heirs and

assigns, all the right, title, and estate of them, the said Robert Ransom, Jr., and Mary Ransom, being one undivided third part of, in, and to those pieces of ground in the city of Washington aforesaid known and described as [here follows an enumeration of the property, including square 53] with the improvements and appurtenances; *and I hereby further* agree in behalf of said Robert and Mary Ransom, that they shall and will, as soon as convenient, make and execute *a proper deed of conveyance* of said premises to said Benjamin O. Tayloe in fee simple

"In testimony whereof I have hereunto set my hand and seal this 29th day of November, A. D. 1864.

"GEORGE GIBSON HUNTT. [SEAL.]"

The acknowledgment describes the paper as a "contract of sale" and it is acknowledged as such; it is also endorsed, "Contract of sale."

On the 21st of June, 1864, Benjamin Ogle Tayloe, being then a tenant in common with the Huntt heirs, obtained from the corporation of Washington a "tax deed" of the property, and on the 25th of February, 1868 (Rec. 25), he died, leaving a last will and testament (Rec. 68), whereby he devised all his real estate in fee and in common to his three daughters, one of whom, Julia D., afterwards (May 3, 1865) became the wife of the defendant John W. Paine. December 7, 1870, by a deed in partition executed by the widow and devisees of said Tayloe, said Julia D. Paine took whatever title the parties to said deed had to said square 53. The evidence of the defendant Paine shows that the property was vacant and unoccupied until some years after the date of this partition deed. On the 25th of February, 1872, Julia D. Paine died intestate, leaving surviving her her husband, John W. Paine, and three children, Estelle T. Paine, John Paine, and Ogle Tayloe Paine, all of whom are defendants to this suit.

Mary Ransom never made this deed of conveyance re-

ferred to in Gibson Huntt's contract of sale. She died intestate on the 7th of February, 1881, at New Berne, North Carolina, and her husband, Robert Ransom, who survived her, died January 14, 1892. The complainants, who are the heirs at law of said Mary Ransom, filed the original bill in this cause February 10, 1893, and the amended bill December 16, 1893. This bill, after setting forth the material facts as above given, alleges that the power of attorney purporting to have been executed by Robert and Mary Ransom to be void so far as it affects her title to said square 53, and makes the same averment as to the contract of sale of George G. Huntt. It claims that a one-sixth undivided interest in the property is vested in the complainants as co-tenants with the defendants, and charges that the defendant John W. Paine, who is tenant by the courtesy of an undivided five-sixths of said property, "since the death of Julia D. Paine, and about the year 1890, without the knowledge or consent of complainants, erected twenty-two large brick dwelling-houses upon said square, which said houses occupy the entire square, and each is now occupied by separate and distinct persons renting severally from said Paine by separate and distinct contracts, and said Paine is, and has been ever since, as complainants are informed and believe, receiving the rents and profits thereof, and has rendered no account to complainants of said receipts, though requested so to do."

The bill prays that the contract of sale be declared null and void as a cloud upon the title of complainants; "that the right of complainants to a one-sixth interest in fee as tenants in common of said square fifty-three be established against *all* the said defendants by decree of this court, as well the life tenant as said reversioners," and that a partition or sale may be had of the property, and closes with prayers for an account and for further relief.

Personal service of the subpoena to appear to the original bill not being obtainable against the defendants, an order of publication in the usual form was had, whereupon the defendants, "appearing specially," moved to quash the said order, which being overruled, a demurrer, set out on page 4 of the record, was filed.

This demurrer, after argument, was overruled and thereupon the defendant John W. Paine filed a separate answer, and his children a joint answer. *Mutatis mutandis*, the answers are substantially the same, so that a synopsis of one of them will be sufficient. Both of the answers are preceded with the following averment:

"This defendant, not admitting the jurisdiction of the court herein nor waiving his objection thereto heretofore made by his counsel specially appearing for that purpose, but expressly denying the jurisdiction of this court and insisting upon his objection thereto so as aforesaid heretofore made, and now and at all times hereafter saving to himself all and all manner of benefit or advantage of exception or otherwise that can or may be had or taken to the many errors, uncertainties, imperfections in the said bill contained, and not intending hereby to waive his demurrer to the said bill heretofore filed herein, but expressly insisting upon the same and answering said bill only under compulsion by the order of this court, for answer to the said bill or to so much thereof as he is advised it is material for him to make answer, answering, saith"

Th n proceeding to answer the bill he avers, *without denying that Henry Huntt died seized in fee of said square*, "that he has no knowledge and cannot therefore admit" the allegations of the bill, but that "whether he [Henry Huntt] was ever so seized or not, this defendant says that subsequent thereto and on June 21, 1864, the said Benj. Ogle Tayloe was sole seized in fee of the said

square fifty-three, and so continued sole seized in fee thereof until his death." This claim of sole seizin, as appears by the testimony, is made by virtue of the tax deed obtained by Tayloe on the date named, at which time he was admittedly a tenant in common with Henry Huntt's heirs. It is also proper to state that, on the argument below, counsel distinctly disclaimed any title by virtue of this deed.

The answer then proceeds to set up the power of attorney and the contract of sale heretofore referred to, and alleges the receipt of the purchase money with full knowledge of the facts by Mary Ransom. The death of Julia D. Paine, and that the children named are her heirs at law, are admitted; but it is averred that Julia D. Paine died seized of "the whole of said square," and that her husband, John W. Paine, is the tenant by the courtesy thereof. John W. Paine admits that he has erected the twenty-two houses as charged, and that he has collected the rents thereof and still collects them, and that said houses are in occupation of several and distinct tenants holding under him. *He does not deny* the allegation of the bill that these houses were erected *without the knowledge or consent of the plaintiffs.* He avers that if complainants have any right their remedy is plain and adequate at law, and claims the same advantage of this averment as if it had been specially pleaded. Further answering, he says that he and those under whom he claims have been in actual, open, &c., possession of said square, holding adversely to complainants for more than twenty years, and denies the right of complainants to any part of said square. He then avers that certain ejectment suits were brought against him by Robert Ransom in his lifetime, but were abandoned. The records of these suits are not before the court, however, the defendant having failed to file copies of the record.

The only effect which the averment can have is to show that Robert Ransom, in his lifetime, *did* claim an interest in this land, and was endeavoring to assert it at the time of his death. Lastly, the defendant sets up that his improvement of the land and payment of taxes, &c., were made in good faith.

Testimony was taken by both sides; but there is little or no controversy as to the material facts. The questions at issue are purely matters of law. It will hardly be contended that any adverse occupation, such as the law requires to bar the record title, has been made out, even if it be conceded that such a possession could avail in a case where the plaintiffs' right of action only accrued about a month before the bringing of the suit.

The court below dismissed the bill, and from that decree this appeal is taken.

Assignment of Errors.

1. The court erred in finding that the alleged power of attorney, dated the 23d day of May, 1859, from Robert Ransom, Jr., *et ux.* to George Gibson Huntt was a valid and sufficient instrument to pass the fee of Mary Ransom to the real estate therein described.

2. In finding that the paper dated the 29th day of November, 1864, and found on page 58 of the transcript of the record was a valid and sufficient instrument to pass the fee title of Mary Ransom to the real estate described therein.

3. In holding that said alleged power of attorney had not been revoked.

4. In holding that the act of Congress March 3, 1865, cured any of the alleged defects in the instruments mentioned in the 1st and 2d of these assignments of error.

5. In holding that said Mary Ransom, a married woman, was by said act empowered to convey her real estate by power of attorney, and that said act was retroactive.

6. In not holding that as neither the defendants nor those under whom they claim were in actual possession of said real estate on the 3d day of March, 1865, the said act of Congress of that date had no application to the instrument mentioned in the 1st and 2d assignments of error.

7. In finding that the purchase-money from the alleged sale of the land in controvery was received by said Mary Ransom.

8. In dismissing the bill of complaint.

9. In not granting the relief prayed for in said bill.

Before discussing the assignment of errors it would seem proper to first dispose of the question of jurisdiction raised by the defendants. Their objection in this respect is twofold. It is claimed:

1st. That the court has never obtained jurisdiction by proper process over the person or subject-matter.

2d. That even had such process been obtained the court has no jurisdiction to grant the relief prayed,—the remedy, if any, being at law.

THE MOTION TO QUASH THE ORDER OF PUBLICATION WAS PROPERLY OVERRULED.

We can scarcely conceive any ground of argument against this proposition. The Revised Statutes of the District, section 787, which has been adopted by the court as one of its rules—Rule 17—provides that "publication may be substituted for personal service of process upon any defendant who cannot be found in suits for *partition*," etc. The fact that this is a suit for partition seems to settle the question without argument.

THE DEMURRER WAS ALSO PROPERLY OVERRULED.

The jurisdiction of a court of equity to entertain this case is plain for a number of reasons:

1st. To avoid multiplicity of suits. The bill and the testimony show that there are twenty-two houses occupied by twenty-two different tenants holding under twenty-two separate and distinct leases. The defendants themselves are non-residents. Even, therefore, if the court had jurisdiction for no other purpose, it would maintain it to avoid the twenty-two ejectment suits that would otherwise be necessary to assert the title of the plaintiffs.

2d. A judgment in ejectment would be binding only on the life tenant; after his death, the entire litigation could be reopened by the reversioners, so that the remedy at law is neither adequate nor complete. Boyce v Grundy 3 Pet. 215

3d. The *only* method of obtaining an adjudication of the plaintiff's title binding upon the reversioners is in equity, by a bill in partition, and that such a bill can be maintained the authorities all agree.

"A decree [in partition] may be obtained where there are remaindermen who may come into esse and be entitled, for they will be bound by a decree made against the tenant for life." (White & Tudor Lead. Cas.; Agar *v.* Fairfax, vol. 2, pt. 1, p. 501, citing Wills *v.* Slade, 6 Vesey, 498, and Gaskel *v.* Gaskel, 6 Sim. 643.)

"The remedy [in partition] in equity is not confined to tenants in possession, but extends to all persons interested, whether presently, or in expectancy; and *remaindermen*, *reversioners*, infants and persons not in esse may be bound by the decree." (Pom. Eq., vol. 3, 1387, citing Lord Book *v.* Lord Hertford, 2 P. Wm. 518; Gaskel *v.* Gaskel, 6 Sim. 643; Hobson *v.* Sherwood, 4 Bear. 184; Wills *v.* Slade, 6 Ves. Jr. 498.)

"But while all persons interested in the land, whether in possession or expectancy, are proper parties to a bill for partition, only those in possession are entitled to file the bill." (Evans *v.* Bagshaw, L. R. 8 Eq. 469; Agar *v.* Fairfax, 2 Lead. Cas. in Eq. 880, 894; Striker *v.* Mott, 2 Paige, 387.)

"Where one owns an undivided share in fee he may have partition against tenant for life and remaindermen of the other undivided moiety [exactly our case] binding upon the remainderman." (Shaker *v.* Mott, 2 Paige, 387; Chan. Walworth, 1831; Woodworth *v.* Campbell, 5 Paige, 518; 1 Story Eq. Jur., secs. 656, 656a.)

The case of Moore *v.* Shannon (6 Mackey, 157), cited by Mr. Justice Hagner in his opinion in the court below, in nowise conflicts with the doctrine of these cases. On the contrary, it is in entire harmony with them. In that case a widow had been assigned as her dower a life estate in six out of a number of lots of ground of which her husband had died seized. While in the enjoyment of the life interest, some of the reversioners filed a bill against the other reversioners praying a partition or sale of the reversionary interest, and the court very properly held that reversioners could not maintain a bill in partition, which was exactly what was held in Evans *v.* Bagshaw, Striker *v.* Mott, and the cases cited in 2d Lead. Cas. in Eq., *supra*,—viz., that while all persons interested in the land are proper parties to a bill in partition, *only those having an interest in possession* are *entitled* to file the bill. In the case at bar the estate sought to be partitioned is held as follows: one-sixth in fee by the plaintiffs, and the other five-sixths by one of the defendants for life with the reversion in the other three defendants. If the reversioners had filed this bill to have their reversionary interest partitioned amongst themselves, of course they could not have maintained it; but the plaintiffs, who are not

reversioners, may file the bill and have their one-sixth share in fee set off to them, and to bind the reversioners by the decree they are made parties. Mr. Justice Hagner undoubtedly misapprehended the case before him. In his opinion, printed in the record, he seems to have overlooked the fact that the jurisdictional question had *already* been decided in this case by Chief Justice Bingham upon the demurrer, in which the very questions raised by the defendant—among them the fact of his being in possession and the plaintiffs out of possession—were made grounds of demurrer, and overruled by the court. For the purposes of the case before the court below, these questions were *settled*. The "law of the case" had been made by Chief Justice Bingham; for where a question of law is once determined in a case, it becomes the law of *that* case through all the subsequent proceedings and cannot be gone into again. This doctrine is as settled as the hills. (Wells Res Adjudicata and Stare Decisis, chap. 44.) But, conceding his right to go into that question, we submit that he was entirely wrong in holding that it was necessary for the plaintiffs to be in actual possession of the *locus in quo* before the jurisdiction in partition will attach. His citation in his opinion (Rec., p. 66) of the note to Mr. Pomeroy's text shows that the learned justice completely misapprehended the meaning of this word "possession" as there used. Mr. Pomeroy had stated in the text that the remedy in partition is not confined to tenants *in possession*, but extends to all persons interested, whether *presently* or in *expectancy;* then in a note it is said: "While all persons interested in the land, whether in possession or expectancy, are proper parties to a bill for partition, only those *in possession* are entitled to file the bill. The learned judge below takes this to mean *actual* possession—*a pedis possessionis;* but it is plain, from the

authorities we have already cited, as well as from the text of Mr. Pomeroy himself, that what is meant is an *interest in possession—i. e.*, a present interest as distinguished from an interest in expectancy. The very case cited by Mr. Pomeroy in support of the note shows this to be the meaning of his language. Thus in Evans *v.* Bagshaw (L. R. 8 Eq. 469), Lord Romilly, M. R., delivering the opinion, says: "It is unnecessary to go into this question of what *interest in possession* would entitle a person to file a bill. Here there was nothing more than a reversion and a charge on that reversion. The person entitled to *that* could not file the bill; and they cannot by afterwards *acquiring an interest in possession* set up a title which they had not originally." And in Agar *v.* Fairfax (2 Lead. Cas. Eq. 880), the other authority cited, the language is, "A person when *entitled in possession* only can file a bill for partition. It has been held, therefore, that a bill for a partition cannot be maintained by a joint tenant or tenant in common in *reversion or remainder*," citing Evans *v.* Bagshaw. So that the very authorities cited by the learned justice show that he has misapprehended the technical use of the word "possession" as applied to the rule under consideration.

Undoubtedly the general doctrine is that when the plaintiff is out of possession and his title is *disputed* by the defendant in possession, a bill in partition will not lie until the *legal* title has been determined by a court of law, and for that purpose the court will retain the bill until the case has been tried at law. This was held by the general term of the supreme court of this District, in Howard *v.* Howard, 20 Law Reporter, 804. But there are several, indeed a number of exceptions to the rule; thus the bill may be maintained:

1st. If the plaintiff claims an equitable title.

2d. If the *defendant* claims an equitable title.

3d. If the remedy at law is not adequate or complete.

4th. Where there are other equitable matters alleged in the bill as a ground of relief, in which case, as the chancellor must determine the title in order to afford relief upon these other grounds, he will not stop with partial relief but will go on and grant the partition prayed for.

5th. If the title set up by the plaintiff is not doubtful, a mere hostile claim on the part of a tenant in common will not oust the jurisdiction.

Let us see if the authorities sustain us in these propositions:

The first proposition, viz., that where the plaintiff's title is equitable the court will take jurisdiction because courts of law do not recognize such titles, is so well settled that we need not discuss it. The corollary of this, however, that when the defendants set up an equitable title the court will not send the case to law, because to do so would only postpone the litigation to the time when the plaintiff, having established his legal title, returns to equity praying a partition of the estate, has not been so often before the courts. But the cases, though few, are equally as conclusive. Their application to the case at bar will be perceived when we bear in mind the fact that the defendants set up as a defence, in case all others fail, that of an equitable estoppel; that is to say, that we are estopped to set up title because (as they allege) the ancestor of the plaintiffs received the purchase money.

"The defendant denies the title of the complainant to any interest in the property. Generally, in such cases, the practice is to retain the bill until the right can be tried at law. (Boone *v.* Boone, 3 Md. Ch. Dec. 497; Wilkin *v.* Wilkin, 1 Johns, 468.) But, as the point is to be determined in this case upon principles of equity, the

complainant having shown a legal title, *and the defendant relying upon a defence cognizable only in a court of equity*, if the court in which the partition is sought does not entertain the question of title, the defendant would be deprived of the benefit of her defence altogether, for none such as that relied on here could be made at law." (Campbell *v.* Lows, 9th Md. 500, at p. 508.)

In Foust *v.* Moorman (2 Ind. 17) it was held that in proceedings for partition, "when the question of title arises on an equitable title set up by *defendants*, the court of chancery will decide, for equitable titles belong to it and the parties cannot be sent to law."

And so the learned annotator of the American notes to White and Tudor's Lead. Cases in Equity, vol. 2, pt. 1, p. 903, says :

"It will be seen, then, that where the complainant's title is disputed on legal grounds *which are sufficient to occasion a reasonable doubt*, a chancellor will not take the determination of the question on himself and will either dismiss the bill or retain it until the point has been determined by some appropriate tribunal. When, however, the defendant alleges *an equitable title in himself*, or impeaches the plaintiff's right on equitable grounds, the question is *already before the appropriate forum*, and may be considered and resolved as a necessary though incidental step in the final determination of the cause."

In Holloway *v.* Holloway (97 Mo., at p. 643) the court, after determining that the mere fact that the plaintiff was not in *actual* possession of the property was not sufficient to oust the jurisdiction, say :

"Independently of this, the defendant, in his answer, discloses a fact which would authorize the exercise of jurisdiction in this case, in that the right or title charged to be in some other person than the plaintiff, while on its

face a legal title, is but an equitable one, to establish which it *might* be necessary to invoke the powers of a court of equity."

Our statute can have no meaning when it declared that in partition proceedings "the court may, in *addition* to the powers conferred by the act itself, exercise such powers as are or may be conferred by virtue of the general equity jurisdiction of the court," if the equitable question of the right of these defendants may not be determined and give jurisdiction to the court in this proceeding.

We have already shown that the remedy at law is in the case at bar inadequate for the reason that no judgment at law will bind the reversioners, so that we need not dwell further upon this aspect of the case. So, too, we think it too well settled for discussion that where there are other equitable matters set up in the bill than mere partition, the jurisdiction will attach. The right of the plaintiffs to have their title cleared of the clouds which these outstanding deeds have put upon it; their equity for an accounting; their equity to prevent multiplicity of suits, &c., are matters which give jurisdiction to the court beyond the mere question of partition.

Lastly, and perhaps the most important objection is that which seeks to oust the jurisdiction of the court because, in addition to the plaintiffs not being in actual possession, the defendants claim title in hostility to them.

There is no pretence that the adverse possession of the defendant has continued for such a length of time—twenty years—or has been of such a character that it would bar the plaintiff's right; and even had they had twenty years *continuous* occupation of the property, it would not avail them in this case, for it is conceded that Mrs. Ransom was a married woman at the time of the accruing of the de-

fendant's alleged title, and that after her death Gen. Ransom, by virtue of his courtesy estate, prevented the plaintiffs from ever setting up a claim to the possession until about a month before the bill was filed. The mere fact that a defendant in partition sets up an adverse possession will not be sufficient to oust the jurisdiction in partition when it plainly appears that the adverse possession thus set up is either short of the period required to bar the real title, or that because of coverture or some other disability on the part of the plaintiffs it cannot prevail against them.

The authorities are uniform on this proposition. Mere *possession* by the defendant, they say, does not prevent the jurisdiction from attaching, for *actual* possession by the plaintiff was never required if it appear that he has an immediate *right of entry.* Upon this point the following authorities would seem conclusive :

The Alabama code, sec. 1923, provides, as does ours, that—

" When an inheritance, or share of an inheritance, descends to several persons, they take as tenants in common, in proportion to their respective rights, unless it is otherwise provided by law."

And section 3588 provides :

" In suits for partition of lands, if the defendant denies the title of the complainant, the chancellor need not dismiss the bill, or delay the suit until a trial can be instituted and had at law, but may direct the issue as to the title of the complainant to be tried as other issues of fact are triable."

This is substantially the state of the law in this District, and the Alabama code only declares the law as it existed

prior to the statute. Now, when a party defendant in a partition suit sets up an adverse possession, the courts of Alabama, construing this statute, have over and over again declared that the adverse possession set up must be a possession for the period which the statute of that State requires (15 years) to ripen it into a fee title. Gore *v.* Dickenson, 98 Ala. 363 (decided 1892).

"Though complainants may have been out of possession many years, and the defendant in adverse possession excluding them, if such possession has not continued long enough to vest an indefeasible title under the statute of limitations, the court has jurisdiction to grant partition." (Berry *v.* Webb, 77 Ala. 507.)

In Math *v.* DeBardelaben (75 Ala., at p. 71) the court, in considering the question of adverse possession as a bar to partition, after holding that the adverse possession set up must be such as on its face, if true, would bar the real title, and that when such a claim appears on the face of the answer the question of fact thus raised will be remitted to a jury, go on as follows:

"We are not aware of any authority in England which declares that the disseisin of a tenant, not so long continued as to bar the right of entry, is an impediment to the exercise of the jurisdiction of the court. All controversies there arising as to the legal title, *if not determined by the court*, are regarded only as cause for staying proceedings and directing actions at law. (Porter *v.* Cerard, Ambler, 236; Baring *v.* Nash, 1 Ves. & B. 566; Gifford *v.* Williams, L. R. B. Eq. 494; Monroe *v.* Walbridge, 2 Ark. 410.) What is the weight of authority prevailing in this country it is not necessary to discuss. We are inclined to the idea that the better opinion is that the mere circumstance of an adverse possession, *if the complainant has an immediate right of entry*, [which is the same as saying if the adverse possession claimed is of a less period of time than

that fixed by the statute] will not prevent the equitable jurisdiction from attaching." (Hawley *v.* Soper, 18 Vt. 320; Miller *v.* Dennett, 6 N. H. 109; Marshall *v.* Crehore, 13 Metcf. 462; Godfrey *v.* Godfrey, 17 Ind. 6; Howey *v.* Gosings, 13 Ill. 95; Overton *v.* Woolfolk, 6 Dana, 367; Obert *v.* Obert, 2 Stockton (10 N. J. Eq.) 98; Lucas *v.* King, ib. 277; Tabler *v.* Wiseman, 2 Ohio St. 207.)

The authorities also fully sustain the text; thus in Howley *v.* Soper (13 Vt., at p. 322) the court says:

"It is objected that the plaintiff was not entitled to partition without showing himself in actual possession with the defendant. And as the plaintiff rested his case upon the exhibition of paper title, and introduced no evidence of his actual possession, it should doubtless be taken that he had no such possession. But *actual* possession is not essential in such a case, provided the party is not legally *disseised*. (Morroe *v.* Walbridge, 2 Ark. (Vt.) 410.) And for this purpose a distinction is recognized between a mere possession of the plaintiff's share by a third person, or by the defendant, and a legal disseisin. Such possession may often be treated as a disseisin by the plaintiff's election,(as for the purpose of bringing ejectment,) when it is not conclusively so in contemplation of law. It would seem that even adverse possession, *short of the period* required to confer a title by the statute of limitations, does not always work such a disseisin as will oust the right to apply for partition. The instances to this effect, however, are where a *privity* has existed between the parties as parceners, joint tenants, or tenants in common of the estate, and the possession is rendered adverse by the claims of one party, made *in opposition to the ordinary presumptions of law*, just as in the case at bar the possession of the widow is always *presumed* to be in subserviency to the title of the heirs, for it is a title in *privity* with the heirs. In such a case the other party has been allowed to consider himself as still seized, and to demand partition, notwithstanding such adverse claim and possession. (Clapp

v. Bromagham, 9 Cowen 566; Barnard *v.* Pope, 14 Mass. 43)"

Shaw, chief justice of Massachusetts, in the case in 14 Metcf., at p. 464, reviews the law in that State, and declares it to be in consonance with the foregoing, and he says:

"The same rule is substantially adopted in other States, though there is some difference in the terms of their statutes regulating partition. (Smith *v.* Bustus, 6 Johns, 215; Clapp *v.* Bromaghan, *supra;* Lloyd *v.* Gordon, 2 Harr & McHenry, 260; 3 Fairf. 320.) The general result of the cases seems to be that, when the right of the party is not barred by lapse of time, by descent, cast, or otherwise, the process lies."

The case from 2 Harr & McHenry, 260, was a writ of partition at law, but it was set up as a defence that the defendant was in adverse possession, and therefore the writ would not lie until the title had been tried in ejectment. "If one parcener," said counsel for defendant, "disseise another, there can be no partition during the disseisin, but the party ousted must first bring his ejectment to recover possession. (Co. Litt. 167 *a*, Dyer, 79 *b*.)" But the court, Harrison, Ch. J., delivering the opinion, said:

"No possession of one tenant in common can bar a writ of partition of the other, unless it be an adverse possession, continued such a length of time as would take away the right of entry of the other, to wit, an adverse possession of twenty years."

The fact that the case was not in equity, we conceive, can make no difference. What the court meant was that, unless it was claimed the *possession* had continued for twenty years, there was no necessity to drive the plaintiffs to an action of ejectment.

In Overton's Heirs *v.* Woolfolk (6 Dana, Ky. 371) the defendants denied the title of the complainants and set up an adverse possession in themselves of the property, but the period of occupation was less than that required by the statute.

The court said:

"We know of no adjudged case in which the principle has been settled that the *bare fact* of an adverse holding of a part of the land by one joint tenant in common would be a good ground to defeat the jurisdiction of a court of equity in a bill for partition until after the right to possession was settled at law."

The court then discusses the question whether a mere *denial of the title* would oust the jurisdiction, and says it is only where the complainant's title "is doubtful or suspicious" that he will be sent to a court of law. If the complainant's title is clear, as it must be, when the only defence is that of a possession of less than 20 years, there is no ground for sending the case to a court of law. To the same effect is the language in Howey *v.* Gosings (13 Ill. 95), when Mr. Justice Trumbull, in delivering the opinion of the supreme court of the State, said: "There can be no doubt, however, that a bill in chancery lies for partition, notwithstanding an adverse possession, unless it has been continued sufficiently long to bar a recovery under the statute of limitations, *which is not pretended in this case.*" This language was quoted with approval in Cuyler *v.* Ferrill, 5 Circuit Court U. S., 1 Abt. U. S. Rep. 182.

In Lucas *v.* King (10 N. J. Eq. 277) we quote, for convenience, from the head note:

"The *bare denial* of the complainant's title is no obstacle to the court's proceeding with partition. The

defendant must answer the bill, and if he sets up a title adverse to the complainant, or disputes the complainant's title, he must *discover* his own title. If, when the titles are spread before the court upon the pleadings, the court can see there is no valid legal objection to the complainant's title, there is no reason why the court should not proceed to order the partition. But where there are *serious* questions, both of law and fact, involved in the controversy between the parties as to the title, the court retained the bill and gave the parties an opportunity of settling the title at law."

The Ohio statute of partition provides "that all joint tenants, tenants in common, and coparceners of any estate in lands," &c., may have partition, and the court in Tabler *v.* Meriman (2 Ohio State, 211) said: "A right of entry is sufficient. If the tenant is not prevented, by an intervening estate, *i. e.*, is not a remainderman or reversioner from recovering the possession in an action at law, he ought not, and I think would not, be disabled to prosecute his writ of partition."

In Freeman on Co-Tenancy and Partition, sec. 450, the learned author says:

"The limitations attending proceedings in partition are constantly weakening and the tendency to do full and complete justice to the parties in one action is becoming irresistible. Wherever the question has recently arisen as a new question, the answer to which the courts were free to give without consulting decisions made at an early day when the common-law rules were more potent than at present, it has been resolved in favor of taking jurisdiction whenever the complainant shows himself *seized* of the requisite title, whether the lands sought to be partitioned are held adversely to him or not."

In Godfrey *v.* Godfrey (17 Ind. 6), heard on demurrer to the bill, it appears that the Indiana statute provides

that "all persons holding lands," &c., may have partition, and the court said it would not construe the word "holding" as requiring actual occupancy, but as equivalent to owning or having *title* to lands. We submit the same construction is to be given our statute which gives to "all tenants in common and coparceners of any estate in lands," &c., partition. It is not persons having *possession* but those having "any estate" with a right of entry in the lands, to whom partition is given.

We have already seen that in Maryland,—Campbell *v.* Lows (9 Md. 500, at p. 511),—in answer to the defence that complainant was not in actual possession of the property of which partition was sought, the court said, "It is clear that the complainant need only show his *title*."

With this array of authorities showing that a mere possession by one of the defendants is not sufficient to oust the jurisdiction in partition if the plaintiffs have an immediate right of entry, we are prepared to hear that our own court in general term has made a similar decision, and such it has in the case of Moore *v.* Shannon (6 Mackey, 157), in which the opinion of the general term was delivered by Mr. Justice Hagner himself, and which, though cited by defendant's counsel, so far from being in conflict with these authorities, is in thorough harmony with them. In that case, as we have seen, the widow being in possession of land which had been assigned her as dower, the reversioners brought a bill for a partition of their reversionary interest, and the court held that under our statute the party must be either seized *or* in possession of the land, citing Freeman Co-Tenancy and Partition. The court says: "It is a general rule prevailing in England, without exception, and also throughout the majority of the United States, that no person has the right to demand any court to force a compulsory partition unless he has

an *estate* in possession, one by virtue of which he is ENTITLED to enjoy the present rents, *or* the possession of the property as one of the co-tenants thereof." It is clear from this case that an *actual* possession is not necessary in this District if the complainant has a *right* to an actual possession.

The court, then, has jurisdiction to grant partition in this case not only because of the many equitable questions which arise in it, but because of the inadequate remedy at law—a judgment in ejectment not being binding on the reversioners—and because of the great number of suits which must be brought to settle the title at law, and also because those judgments when obtained would not prevent the defendant from setting up his alleged equitable title when the case returned to this court, and finally because there is no *doubt* of the *legal* title being in the plaintiffs.

THE OPINION OF THE COURT OF APPEALS UPON THE JURISDICTIONAL QUESTION.

The court below, without determining it, considered the jurisdictional question. It *seemed*, however, to lean against the plaintiffs' contention. In doing so it will be observed that the learned judge delivering the opinion ignored nearly every one of the points raised in this brief, thus—

1. He failed to note the distinction between a *right* of possession and an actual possession, yet he cites the very cases (Agar *v.* Fairfax, 2 Lead. Cas. Eq., Moore *v.* Shannon, and Freeman on Co-Tenancy) in support of the proposition that the possession must be actual which we have cited to show that *right* of possession is sufficient.

2. He ignores the fact that we are not seeking by this

proceeding to gain an *actual* possession of the property; we are asking merely that the defendants (our co-tenants, whose actual possession is constructively our possession) be required to make partition and account for our share of the rents and profits.

3. He ignores the fact that the remedy by ejectment at law by reason of the judgment in such action not being binding on the reversioners is not "a full and adequate remedy."

4. He ignores the fact that to proceed by ejectment would, as shown by the record, necessitate twenty-two separate and distinct actions against separate and distinct tenants—the defendant himself being a non-resident. Such a needless multiplicity of suits a court of equity would surely relieve against.

Any of these grounds would give jurisdiction to a court of equity, to say nothing of the *accounting* and other grounds set up in the bill.

Having, as we believe, established the jurisdiction of the court, we are now brought to a consideration of the matters set up in the *assignment of errors*.

First Assignment of Error.

1. The court erred in finding that the alleged power of attorney, dated the 23d day of May, 1859, from Robert Ransom, Jr., *et ux.* to George Gibson Huntt was a valid and sufficient instrument to pass the fee of Mary Ransom to the real estate therein described.

The consideration of this alleged error involves a consideration of all the other assignments of error.

The plaintiffs contend:

1st. That a married woman in this District, prior to the married woman's act, could not convey her real estate by power of attorney.

2d. That neither the Maryland statutes nor the act of Congress of March 3, 1865, have not changed the law so as to make valid powers of attorney executed by married women prior to that date.

3d. Because that statute applies only to parties in *actual possession* at the time of its passage, and it is conceded that no one was in such possession at that time.

4th. That even if the language of the act of 1865 were sufficient to cure the otherwise invalid instrument of this character, it could have no effect in this particular case, because the power of attorney itself had been long before *revoked* by the war.

5th. That even if the defects in the power of attorney were cured by the act of March 3, 1865, that act had no operation upon the "contract of sale."

6th. That even conceding that she received the purchase money she was not estopped, nor are her heirs estopped, to set up their title.

7th. That the equities of the case are with the plaintiffs.

We shall consider these questions in their order.

I.

A married woman could not, prior to 1869 (when the married woman's act was passed), *convey real estate* in this District by power of attorney.

But for the opinion of the court below we would have supposed no argument was needed to establish this proposition. Such was the rule at common law, and that law upon this subject, except as to the separate estate of married women, created by the act of 1869, remains in force here. See—

Halliday *v.* Daily, 19 Wall. 606.

Sumner *v.* Conant, 10 Vermont, 1.
Mott *v.* Smith, 16 Cal. 533.
Agricultural Bank *v.* Rice, 4 How. 225.
Rhea *v.* Rhenner, 12 Pet. 345.

This position is based upon the law that the only contract which a married woman could make in respect to her real estate was a conveyance of it by a deed in which she united with her husband. She could make no covenant in respect of it which bound her. She could not bind herself by an *agreement*, in which her husband joins, that she would sell. Plainly and exclusively the law declared that her only power in respect to her real estate was that she could not make any executory contract in respect of it, but that she could, by joining in a *deed* with her husband, convey the property to a purchaser. Under the law of England as it existed at the time of the Revolution, that was all that a married woman could do in respect to her real estate. There was something, however, in addition to the signing and executing of the deed jointly with her husband, and that something additional was that she had to make an acknowledgment before the proper officer that it was her deed, and he had to certify that the acknowledgment thereof had been made upon a privy examination of her, apart and out of the presence of her husband, in which she declared that she had executed it voluntarily and that she did not wish to retract it. Now, it is to be observed that this transaction—the only transaction which a married woman could make in respect to her real estate—was composed of two separate and distinct acts:

First, the making and executing a deed jointly with her husband.

Secondly, the privy acknowledgment by her before the officer authorized by law to take such acknowledgment.

But the Court of Appeals reached the conclusion that certain Maryland acts of ancient date gave this power (to convey by attorney) to married women, a fact which we venture to say was never before so understood either by the bar of Maryland or of this District. Indeed, the defendants' counsel, with all their distinguished ability, never thought of making this assertion in his brief in the court below.

The acts of Maryland referred to by the Court of Appeals are to be found in Kilty's Laws of Maryland, and, so far as they relate to the question under consideration, are as follows:

The act of 1715, chap. 47, is entitled—

"*An act for quieting possessions, enrolling conveyances, and securing the estates of purchasers.*"

The first seven sections need not be quoted; the remaining sections are as follows:

Sec. VIII provides that no manor's land, etc., "shall pass, alter, or change from one to another, whereby the estate of inheritance or freehold, or any estate for above seven years, shall be made or take effect in any person or persons, or any use thereof to be made, by reason of any bargain and sale only, except the deed or conveyance by which the estate shall be intended to pass," etc., be in writing and duly acknowledged and recorded, &c.

Sec. IX. "That when the grantor or grantors, bargainer or bargainers, of *such* lands, tenements or hereditaments, shall live remote from either the provincial court, or county court where the land lieth, it shall and may be lawful for such grantor or bargainer to acknowledge the same in the county where such bargainers live * * * and if any such grantor or bargainer of any lands or ten-

ements as aforesaid shall happen to be out of this province, within any of his majesty's dominions, at the time of ensealing such writing or writings indented, so as the same cannot be acknowledged, as is before directed, or enrolled within the time for that purpose hereinbefore limited, that in every such case such lands or tenements as aforesaid shall be acknowledged by a letter of attorney well and sufficiently proved either in the provincial or county court where such lands or tenements lie, or before one justice of the provincial court, or two justices of the county court as aforesaid and be enrolled as aforesaid."

Sec. X provides that such deeds shall take effect from the date of enrollment and not from the date thereof.

SEC. XI. "That if any *feme covert* be named as a grantor in any such writing indented, the same shall not be in force to debar her or her heirs, except upon her acknowledgment of the same, and the person or persons taking such her acknowledgment, shall examine her privately, out of the hearing of her husband, whether she doth make her acknowledgment of the same willingly and freely, &c., * * * and that the person or persons so examining her shall (in a note or certificate of the taking of the said acknowledgment) certify her examination and acknowledgment thereupon, and that such certificate be likewise enrolled upon record; in which case, and by such acknowledgments and certificates, *feme coverts* shall be barred, *and not otherwise.*"

The act of 1766 is entitled—

"An additional supplementary act to the act entitled 'An act for quieting possessions, enrolling conveyances, and securing the estates of purchasers,'"

and recites in the preamble that whereas the former act extended only to "such conveyances as operate" by way

of bargain and sale; and the good ends and purposes of said act are now in great measure eluded by the frequent use of conveyances by feoffment, lease and release, confirmation, release, limitation, and declaration of uses, and other modes of conveyancing, &c. The act then proceeds by apt language to extend the provisions of the act of 1715 to said deeds of feoffment, &c.

Section XI of the Act of 1715 plainly excludes the construction that Sections VIII and IX include *married* women within their purview. Section XI provides how married women shall make acknowledgment of deeds, but makes no provision for acknowledgment by letter of attorney. The previous sections (VIII and IX) refer plainly to persons *sui juris*. The same argument that would include married women within their purview would include infants, and other persons incapacitated by law to contract. Moreover the "letter of attorney" provided for was not to *sell and convey* land but merely to acknowledge a deed. Its purpose was to enable grantors, bargainors, etc., "out of the province" (and, therefore, unable to acknowledge them before the proper offices) to send their deed of conveyance *signed and sealed* and accompanied by "a letter of attorney" empowering the attorney to *acknowledge* the deed "in the provincial or county

The Court of Appeals, though referring to these ancient statutes of Maryland as authorizing a married woman to give a valid power of attorney to a third person to *make* a deed for her of her real estate, as well as to acknowledge it, do not seem altogether satisfied that these statutes alone would make the power of attorney in this case valid. It has recourse, therefore, to the act of Congress of 1865 (R. S., D. C., secs. 458–465), and the argument seems to be that as that act refers to powers of attorney of married women, it must be that these Maryland acts of 1715 and 1766 gave married women the power to make such instruments, otherwise the act of 1865 would be insensable. But this is a *non sequitur*.

What were these powers of attorney, executed by married women, which the statute was referring to? If we can readily construe the act of 1865 to apply to a class of cases in which by then existing law a married woman had the right to authorize her attorney to sell her real estate, it will not be necessary to *strain* the Maryland acts of 1715 and 1766 so as to give meaning to a statute passed a hundred or more years later. Now a power of attorney by a married woman authorizing a third person to convey her real estate could always be made by her if she held her estate (as she might do) with an unqualified power to dispose of it. In *that* class of cases a married woman has the right and power just as if she were a *feme sole* to appoint an attorney for the purpose of selling and conveying her estate. (See Adams' Equity, 45.) The act of 1865 could therefore well be construed to refer to this class of married women's equitable estates when it speaks of a power of attorney executed by a married woman.

Pom. Eq. Jur. Sec 1104

If there be two subjects to which a statute may be construed to apply, and it would apply to one without the violation of any principle of law or rule of construction, whereas the application of it to the other would be an outrage upon both, the court will not make the latter application.

II.

But the act of 1865 cannot, for another reason, be construed to apply to the case at bar, for it applies only to cases of parties in *actual possession;* and it is conceded that in 1859 the lot was a vacant one.

The Court of Appeals, in the case of Hevner *v.* Matthews (4 Ct. of Appeals 380), has recently construed in part the curative act of March 3, 1865. In that case it *refused* to express any opinion whether the words "in favor of

parties in actual possession," as found in the statute, are to be taken merely in connection with the barring of dower. Nor did it find it necessary so to construe it in the case at bar. We have now to submit that the words cannot so be taken. The statute, after enumerating the defects intended to be cured in deeds recorded prior to March 3, 1865, proceeds to declare such deeds—

"To be of the same effect and validity to pass the fee simple or other estate intended to be conveyed, *and bar dower in the real estate therein mentioned in favor of parties in actual possession*, claiming under and through such deeds," &c.

If the words in italics are to be taken as limited to the barring of dower, then if we take those words out of the statute the statute will read:

"Are declared to be of the same effect and validity to pass the fee simple or other estate intended to be conveyed, claiming under and through such deeds,"

which is unintelligible.

On the other hand, if we leave out the words "and bar dower in the real estate mentioned," and include the remainder, we have a complete and intelligible sentence, thus:

"Are declared to be of the same effect and validity to pass the fee simple or other estate intended to be conveyed in favor of parties in actual possession, claiming under and through such deeds."

This is certainly the meaning of the statute. Why should the condition of actual possession be limited to cases of dower only? The purpose of the act was curative and remedial. At the time of its passage many per-

sons *were in actual possession*, with valuable improvements erected thereon, of lands the titles to which depended upon defective deeds, and it was to cure the hardships of *such cases* that the statute was enacted. Its purpose was to protect the owners of homesteads and the improvers of property, not real estate speculators *in vacant lots* with defective titles. That it was only for the benefit of those persons who were *then* in possession is evident from the fact that the statute is admittedly not prospective, but entirely *retroactive*. It was not intended to benefit those who might *thereafter* purchase, at a depreciated price, defective titles to unoccupied property, and thereafter, by merely taking actual possession, claim the benefit of the statute and a largely increased price as a result. Such an act might well have been designated "An act to encourage speculation in defective titles."

In Hevner *v.* Matthews, the Court of Appeals has said in this connection: "Seizin is presumed to accompany title, and parties are presumed to be in possession under their deeds until the contrary is shown." This is a well-settled principle, but in whom is the *title?* Is it in the party claiming under the defective deed or in the party claiming under the perfect deed? The authorities have settled it that where two persons are claiming unoccupied property, the one under a perfect title and the other under a defective title, the constructive possession is in him who has the perfect title. The authorities are clear on this: "Both parties cannot be seized at the same time of the same land under different titles, and the law therefore adjudges the seizin of all, which is not in the *actual* occupancy of the adverse party, to him who has the *better* title."

Clarke *v.* Courtney, 5 Peters, at p. 354, where the whole doctrine is discussed.

See, also, Barr *v.* Gratz, 4 Wheat. 213, 233.
Armstrong *v.* Restau's Lessee, 5 Md. 280.
Hoye *v.* Swan's Lessee, *idem*, 237.
Steedman *v.* Hilliard, 3 Rich. (So. Cal.) Ct. of Appl. 101.

These authorities show that there can be no constructive possession when there is actual possession; the latter renders the former at once nugatory. A man claiming under a defective deed can *never* have a constructive possession, but he may have an actual possession, and the moment he takes that actual possession the constructive possession, which up to that time had been in the party claiming under the perfect deed, is gone. Where a statute, therefore, declares that a defective deed shall be deemed perfect *if the party is in actual possession*, it must necessarily exclude a constructive possession. Hence, to say that he has a constructive possession because the statute cures his deed, is to do nothing more than reason in a circle. So that it was not constructive possession but actual possession of the party claiming under the defective deed which was the *sine qua non* of the statute, and that there was no actual possession of this property by any one at the time of the passage of this act must be conceded.

But the court has said [actual] possession is presumed until the *contrary* is shown. In the case at bar we have complied with that condition. The testimony of the defendants themselves show that there was no *actual* possession of this property until long after March 3, 1865. M.. Paine testifies that it was *vacant* property until the erection of these houses in 1890. That he had never even rented the lot to any one until after the death of his wife, in February, 1872, and then only for short periods. We

submit, therefore, that Hevner *v.* Matthews in no way militates against the doctrine contended for in the case at bar.

III.

The power of attorney was revoked by the war.

Even if we concede the power of attorney to have been valid, the power was revoked as soon as the grantors of the power became incapacitated to do the act in person.

In 1864, because of the existence of war, General and Mrs. Ransom, residents of the Southern Confederacy, could not have bargained and sold and conveyed this property to Benjamin O. Tayloe, a citizen of the United States, residing in the District of Columbia. The agent could not do that which the principals themselves could not do. (Story on Agency, secs. 481–484.)

"That war suspends all commercial intercourse between the citizens of two belligerent countries or states, except so far as may be allowed by the sovereign authority, has been so often asserted and explained in this court within the last fifteen years that any further discussion of that proposition would be out of place. As a consequence of this fundamental proposition, it must follow that no active business can be maintained, either personally or by correspondence, *or through an agent*, by the citizens of one belligerent with the citizens of the other. The *only* exception to the rule recognized in the books, if we lay out of view contracts for ransom and other matters of absolute necessity, is that of allowing the payment of debts to an agent of an alien enemy when such agent resides in the same state with the debtor."

Insurance Co. *v.* Davis, 95 U. S. 429.
U. S. *v.* Lapene, 17 Wall. 601.
U. S. *v.* Lapene, 9 Ct. Cl. 31.
Hagner *v.* Abbott, 6 Wall. 532.

U. S. *v.* Grossmeyer, 9 Wall. 72.
Wash. University *v.* Finck, 18 Wall. 106.
Griswold *v.* Waddington, 16 Johns. R. 438.

In Hanger *v.* Abbott (6 Wall. 532), Mr. Justice Clifford, delivering the opinion of the court, said:

"As soon as war is commenced, all trading, negotiation, communication, and intercourse between citizens of one of the belligerents with those of the other, without the permission of the government, is unlawful. No valid contract, therefore, can be made, nor can any promise arise by implication of law from any transaction with the enemy. *Exceptions to the rule are not admitted.* And even after the war is terminated the defendant in an action founded upon a contract made in violation of that prohibition may set up the illegality of the transaction as a defence."

"A power of attorney from a person in a loyal State to one in the Confederate States to sell land in Tennessee was revoked by the existence of the war." (Conley *v.* Burson, 1 Heiskell (Tenn.) 145.)

"Where an agent was appointed in this State by a non-resident person to look after or act as agent for certain lots of land, with no other or general powers, and an attachment was issued against said non-resident owner and levied upon said lots, the agent by virtue of this authority was not authorized to confess a general judgment binding upon said defendant in attachment. *The war revoked the agency of a citizen of this State for a citizen of Massachusetts which existed when the war commenced without any act of revocation or renunciation by the parties.*" (Howell *v.* Gordon, 10 Ga. 302.)

"A general power of attorney to an agent to close up a business, *to sell real and personal estate*, to collect debts, and to do whatever is necessary to effect these objects does not authorize the agent to reinvest the funds of his principal; and such power of attorney executed before

the breaking out of the rebellion, after the contending parties have become, as against each other, belligerent powers, *ceases to have any vitality.* (Stoddart's Case, 4 Ct. Claims, 511.)

It will be observed that in Insurance Co. *v.* Davis (95 U. S. 429, *supra*) the court, while declaring it as a fundamental proposition that agencies of every sort are revoked by war, recognizes *one* exception to this rule, viz., that of allowing the payment of debts to an agent of an alien enemy when such agent resides in the same State with the debtor. A great number of such cases are to be found in the books, and all of these recognize the general doctrine while enforcing the exception. Thus in Wood *v.* Smith (7 Wall. 453) the court says:

"This rule," says Mr. Justice Washington, in Conn. *v.* Penn., "can never apply in cases where the creditor, although a subject of the enemy, remains in the country of the debtor, or has a known agent there authorized to receive the debt, because the payment to such creditor or his agent could in no respect be construed into the violation of the duties imposed by the state of war upon the debtor. The payment in such cases is not made to an enemy, and it is no objection that the agent may possibly remit the money to his principal. If he should do so, the offence is imputable to him and not to the person paying him the money."

We here cite a few cases where a power of attorney or agency to collect debts was held under this exception not revoked, while the general doctrine was recognized:

Sands *v.* New York Life Ins. Co., 50 N. Y. 626.
Manhattan Life Ins. Co. *v.* Warwick, 20 Gratt. 614.
Buchanan *v.* Corey, 19 Johns. R. 137.
Conn. *v.* Penn., 1 Peters, C. Ct., 496.
Denniston *v.* Imbrie, 3 Wash., C. C., 396.

By the act of July 17, 1862 (12 Stat. at L. 591, sec. 6), and the Proclamation of the President, issued in pursuance of it, July 25, 1862 (*id.* 1266), "all sales, transfers, or conveyances of the estate and property" of persons in rebellion after September 23, 1862, were made null and void.

In United States *v.* Lapene (17th Wall. 601) it was held under the non-intercourse act that an agency created while it was legal to create an agency *was revoked* as soon as the parties became residents of hostile portions of the country. "The agency to purchase cotton was terminated by the hostile position of the parties. The agency to receive payment of debts due to Lapene & Co. could well have continued. The purchase gave effectual aid to the enemy by furnishing him with the sinews of war. He was forbidden by the soundest principles of law. The purchaser obtained no title to the cotton."

In Washington University *v.* Finch (18 Wall. 106) the case was this: Daily and Chambers purchased of Elliot in March, 1860, certain real estate in St. Louis, Mo. For part of the purchase-money they gave their promissory notes, and conveyed the property in trust to Ranlett to secure the payment of these notes. Elliot assigned the notes of the Washington University, and on the 9th of December, 1862, being unpaid and due, Ranlett foreclosed the trust, the University being the purchaser. Daily and Chambers at the time of the sale were citizens of the State of Virginia and residing there during the war. After the war the validity of this sale was attacked on the ground that all intercourse between the people of loyal States and those residing in insurrectionary districts was prohibited, and that, by the laws of war, the complainants being forbidden to pay the debt, there could be no valid sale of the land for default of such payment. The court

held that the conveyance by the plaintiffs to Ranlett vested in him the legal title. That it was purely the case of the execution of a power by a person in whom a trust had been reposed in regard to real estate. The land, the trustee, and the *cestui que trust* all being, as they had always been, within a loyal State. That the power under which the sale was made was *irrevocable*. That the creditor had both the legal and the moral right to have the power made for his benefit executed. And the enforced absence of the complainants did not afford a sufficient reason for assisting his agent and the agent of the creditor in performing a duty which both of them had imposed upon him before the war begun. That its exercise required no intercourse, commercial or otherwise, with the complainants, and that the enemy, instead of being strengthened, would have been weakened by the process. This case, it will be seen, practically admits the doctrine contended for by us. The power of attorney in the case at bar was revocable. In Finch's case it was irrevocable. In one case it was the sale of the property of an enemy who was indebted to a citizen of the United States and the proceeds of the sale went to citizens of the United States. In the case at bar the proceeds of the sale went to the person in arms and holding a high military position in the armies of the Confederacy. In the Finch case, so far from aiding the enemy, he was weakened. In the case at bar the sale gave pecuniary aid and comfort to the enemy.

The Opinion of the Court Below as to the Effect of War Upon a Power of Attorney.

The court below, in discussing this question, made no distinction between powers of attorney coupled with an in-

terest and simple naked powers; that is to say, powers which the donor had the right to revoke. All such naked powers were revoked by the war, for the simple reason that when the act which a naked power authorizes another to do cannot be done by the donor himself that works a revocation of the power of attorney. It is otherwise with powers of attorney which are coupled with an interest or under which other parties have rights, such powers of attorney, for instance, as the donor himself could not revoke. Of course, such powers of attorney are not revoked by the occurrence of war. All the cases upon this subject recognize this distinction, holding that where the power of attorney is of such a nature that the donor himself cannot revoke it because there is coupled with the power an interest or estate which deprived the donor of the power to revoke it, that in such cases the war could not revoke it. Take a simple illustration: Prior to the war a holder of a bond or negotiable note had appointed an agent in the place where the obligor or maker resided to collect it; that gave to the maker or obligor the right to pay the debt in order to prevent the running of the interest upon such debt. Therefore, in such case, the breaking out of the war did not revoke the power of attorney of the agent residing in the same jurisdiction in which the debtor resided from accepting the payment of the debt from the debtor, though the creditor might be resident in the sovereignty at war with that in which the debtor resided. The reason of this is that, by virtue of what had transpired before the war and the contract of the parties that the debt should be paid to a certain agent, the debtor became entitled to pay and prevent the accumulation of interest upon it by making a payment of the debt to the agent, and the happening of the war would not revoke such power, because if it did it would deprive

the debtor of a vested right under the contract. Therefore it is that in such a case, if there is no agent in the sovereignty of the debtor to whom he can pay the debt, the accumulation of interest is stopped during the pendency of the war. But if there is an agent appointed prior to the war resident in the same jurisdiction with the debtor, he cannot get clear of paying the interest accruing during the war by alleging the existence of the war, because the conclusive answer to such a contention would be that there was an agent to whom he had the right to pay it during the war, and if he wished to escape the accumulation of interest it was his duty to make payment to the agent. This was decided in the case of Ward *v.* Smith, reported in 7 Wallace, 447. It is admited that it is not a question as to whether or not the appellants or their ancestors were damnified by the transaction of which they complain. The question is deeper and more profound than that, being this, Was the instrument, which it is alleged authorized the act complained of, a valid instrument?

IV.

The instrument executed by George Gibson Huntt was not a conveyance but a contract of sale, and passed no title.

Even if the power of attorney itself were valid, yet that could not avail the defendant, for George Gibson Huntt never exercised the power vested in him. The paper itself is plainly but a contract of sale. It is so recognized in the acknowledgment by the endorsement on the paper itself and by the intention of the parties. It is well settled that whether a paper containing the words "bargain and sell" is to be treated as a contract of sale or a deed of conveyance depends upon the intention of the parties.

Warvelle on Vendors, vol. 1, sec. 24, speaking of the

effect and operation of contracts of sale, uses this language:

"The ordinary effect of an agreement to convey imparts nothing more than an executory promise, and the operation of the instrument will not usually be extended beyond this; yet it will often happen that parties through ignorance of the legal effect of words, inadvertence, or mistake make use of language which, standing alone, indicates a present grant rather than a mere agreement for some future action.

"The employment of the words 'grant, bargain, and sell,' or 'do sell,' or 'by these presents do sell and convey,' or words of like character, all impart a present grant, and their use is by no means unfrequent in agreements for conveyance. But, notwithstanding the contract contains words of conveyance *in præsenti*, still, if from the whole instrument it is manifest *that further conveyances* were contemplated by the parties, it will be considered an agreement to convey and not a conveyance. In determining whether an instrument is an immediate conveyance or only an executory contract, the intention of the parties must be sought for in every part of the instrument. If it contain words of present assurance, these words afford a presumption that an executed conveyance was intended. But this presumption is not conclusive; it may be overcome by the presence of other words which contemplate a future conveyance. *Intention* is so imperative in the construction of grants that *the strongest words of conveyance*—the present tense—*have been* held inoperative to pass the estate *if other parts of the writing evince a contrary intention*, or tend to show that the agreement itself was not designed to pass title.

If the instrument *is called by the parties an agreement*, this is a circumstance of importance, for in popular understanding there is a distinction between an agreement and a deed, the former being regarded as preparatory to the latter, and generally, if by the terms of the contract any material act remains to be done, effect will be given to the instrument only as an agreement to sell."

The authorities abundantly support the text. Thus is Jackson *v.* Moncrief (5 Wend. 26) it is said :

"Although there be words of conveyance *in præsenti* in a contract of purchase and sale by lands, still, if from the whole instrument it is manifest that *further conveyances* were contemplated by the parties, it will be considered an *agreement to convey* and not a *conveyance*."

In Grey *v.* Packer, 4 Watts & Bergh (Pa.), 18, the doctrine is well stated by Sergeant, J. :

" In all the cases cited, where the instrument has been construed executory, although some of the words impart a present grant, yet there were other clauses by which *something further was to be done*, or which showed it to the design of the parties, from the tenor of the whole instrument, that it was to be merely executory."

In Ogden *v.* Brown (33 Pa., at p. 249), Story, J., delivering the opinion, says :

" There are words in this instrument which impart a present conveyance. We think there are others which indicate that it was not intended as a final disposition of the subject-matter ; and if it was not, then the contract must be regarded as executory. * * * Where there is a covenant for a future conveyance the intention is clear ; but the *intention* may be manifested without such covenant."

Where the question is doubtful the court will even go outside of the instrument and examine the circumstances attending the execution to determine the *intent.* Thus in Phillips *v.* Swank (120 Pa. 76) it was held :

" Whether an informal instrument transferring an interest in real estate shall be construed a conveyance or only an executed agreement depends, not upon any par-

ticular words or phases it may contain, but upon the intention of the parties derived from the instrument itself, and, *when that source is doubtful, supplemented by the circumstances attending the execution.*"

That the instrument executed by Huntt was a mere contract of sale can admit of no doubt when read in the light of these authorities. While it contains the words "have bargained and sold," the subsequent language plainly indicates that they were not to have the effect of a *deed of conveyance*, for he says, "and I hereby *further agree*, in behalf of said Robert and Mary Ransom, that they shall and will, as soon as convenient, make and execute a proper *deed of conveyance* of said premises to *Benj. Ogle Tayloe.*"

In Foster *v.* Foster (1 Levinz, 55), one of the principal reasons given by the court for deciding an instrument *executory* was that it was called by the parties "articles of agreement." In the paper now before us it is *acknowledged* not as a deed but as a "contract of sale," and the endorsement on the paper is, "George Gibson Huntt to Benj. Ogle Tayloe—contract of sale." Moreover, the correspondence offered in evidence by the defendant himself shows it was only intended as such. Judge Cox, the attorney, writes:

"He [Tayloe] thought it better, and he is perhaps right, to pay each one of you his or her share *on receiving the deed from each.* He has therefore paid me your share and given me an authority on Mr. Riggs to pay the rest *on receiving the deeds.* This will relieve you of any responsibility as to Minnie's [Mrs. Ransom's] share * * * and she can do what she pleases with it *when the war is over.*"

Thus indicating that Mrs. Ransom was to execute *her deed* at some future time—"when the war is over."

A modification of this understanding was subsequently had, for we find the attorney writing that Mr. Tayloe "has agreed to pay Minnie's share as soon as Gibson [Huntt] will execute a formal *contract of sale*, and then he incloses a deed for Gibson Huntt to execute for his share and a *contract of sale* for "Minnie's share." If it had been intended that Huntt should execute a deed for Mrs. Ransom's share, a *deed* would have been sent him instead of a contract of sale. We submit, therefore, there is no escape from the conclusion that the paper was a contract of sale and nothing more, and this the Court of Appeals conceded.

V.

Being a Contract of Sale and not a "Deed for the Conveyance of Land," Its Defects Were Not Cured by the Act of 1865.

Aside from the fact that the persons claiming the benefit of the act of 1865 must show that they or those under whom they claim were in the *actual* possession of the land at the time of the passage of the act (and it is conceded that there was no such possession in the case at bar), the act only operates upon "deeds for the conveyance of land," and that this instrument was not a deed but a contract of sale we have already seen. The object of the statute was to cure certain defects in *deeds* of record which had been intended by the parties to *pass the title*, and which by reason of some technical defect in the execution of the instrument failed of that purpose. But, as we have just seen, this paper never was intended to pass the title. That was to be done by *another* instrument, a "proper *deed of conveyance*," which Gibson Huntt, the contractor, undertook to get in the future, but never did get. There

is no power in the court or the legislature to make a contract for the parties by turning A's *contract of sale* into B's *deed of conveyance*. The statute, therefore, no more operates upon this paper to make it the deed of Mrs. Ransom than it operates upon a verbal promise. To claim the latter would not be more preposterous than to claim the former.

The Court of Appeals concedes this proposition but decides that the alleged receipt of the purchase-money by Mrs. Ransom created an equitable estoppel in her or her heirs to claim the land.

This brings us to the consideration of the question how far a married woman is estopped in such a case.

In the first place, however, let us say that the evidence of the receipt of the purchase-money is of the vaguest character. The only testimony upon this subject is that of Mrs. Gibson, who testifies (R. 36):

"Q. I will ask you to state whether or not you paid that money over to Mrs. Ranson or for her account in any way?

"A. It was *either* paid over to her or spent for her at her direction.

"Q. By whom?

"A. By myself, *as well as I can possibly remember*."

This is all, absolutely all; not a letter, not a receipt, not an account; but thirty-two years after the money was received by her, she is now able to say, "as far as she can possibly remember," that it was *either* paid over to her or spent for her at her direction.

One of the first elements of estoppel, even against persons *sui juris*, is that it must be shown that the party against whom the estoppel is to operate acted *with full knowledge*, yet not one scintilla of evidence is offered to

show that Mrs. Ransom *knew* where this money came from, even conceding that the evidence is sufficiently clear and positive that she received it at all. But the doctrine which prevails with the best authorities is that even with knowledge a married woman is not estopped.

"The next point is that of estoppel. If, through the administration of equity, we can produce a result which the law denies *ab initio* on grounds of public policy, the estoppel, or compensation, its equitable equivalent, will accomplish what the law and policy have forbidden. But we have seen that in such a case equity does not overturn but follows the law. (Story Eq. § 64 *a*. 3, 96, 97, 177, 243.) Our own cases fully establish that there is *no such doctrine of equity*. In the first place, the receipt of the consideration by a married woman is no ground for the interposition of equity. If it were, then in no case where a *femme covert* has received a *quid pro quo* would her legal incapacity protect her. It would be but technical and, like a penalty, would be relieved against. This would be a flat denial of a legislative policy, founded on the most important reasons, entering into the very constitution of society, and social order must lie at the feet of chancery."

Agnew, J., in Clidden *v.* Strupler, 52 Pa. 400.

"It is insisted, however, that Mrs. Foster should be estopped from denying that she signed and acknowledged the mortgage. The answer to this is that to permit an estoppel to operate against her would be a virtual repeal of the statute that extends to her this protection, and also a denial of the disability of the common law that forbids the conveyance of her real estate by procuration. It would introduce an entirely new system of conveyances of the real estate of *femmes covert*."

Dury *v.* Foster, 2 Wall. 34, Clifford, J.

"A married woman who makes a verbal agreement to release all her interest in certain real estate, and in con-

sideration thereof, receives a conveyance of other real estate, but suppresses no material facts, nor makes any false representations in regard to the matter, is not estopped from claiming her interest in the real estate which she agrees to release, and the contract cannot be enforced against, because she is not competent to make it.

"A married woman may preclude herself from denying the truth of her representations, but only in the case of pure torts. If her conduct is so connected with contract that the action sounds in contract, there can be no estoppel."

Oglesby Coal Co. *v.* Pasco, 79 Ill. 164.

"A bond for the conveyance of land signed by a married woman confers neither a legal nor an equitable title upon the obligees. And as to the receipt of the money mentioned in the testimony after they become sole, it certainly could not operate as a legal conveyance, passing the estate to the grantee, nor give effect to a deed which as to them was utterly void."

Agricultural Bank *v.* Rice, 4 How. 225, 242.

"A married woman is not estopped to set up her title to real estate for which she has made a void deed, notwithstanding she has received the purchase-money, unless she has been guilty of some fraudulent representation." See Oglesby Coal Co. *v.* Pasco, 79 Ill. 164, *supra*, and the following authorities:

Patterson *v.* Lawrence, 90 Ill. 174.
Drake *v.* Glover, 30 Ala. 382.
Connolly *v.* Braustler, 3 Bush. 702.
Bigelow Estoppel, 513 (3d ed.).
Carpenter *v.* Carpenter, 10 C. E. Green, 194.

The learned Chief Justice of the Court of Appeals has cited two authorities in support of the proposition that a married woman is estopped by the receipt of the purchase-money, viz: Bank *v.* Porter, 99 U. S. 329, and Bein *v.* Heath, 6 How. 247. An examination of those authorities

will show that they scarcely bear out that doctrine. *Fraudulent representations* were the basis of the facts of those cases and the opinion of the court proceeds upon that theory.

VIII.

Do the alleged power of attorney and the contract of sale vest in the defendant an equitable estate?

The learned court below proceeds to say, "Lastly, however, the instrument and the sale evidenced thereby have effect by operation of the settled principles of equity to vest in the purchaser an equitable interest or estate." It is respectfully submitted that this reasoning is a *petitio principii*, for it must necessarily proceed from the postulate that the instrument of sale referred to was one which the party whom it is sought to bind by it had the power to make, and that is the very question involved in this case. No results can flow from a *void* act to deprive one of any rights to which he was entitled. What we mean is this: that while it is true that an informal and inchoate contract made by persons who had the *right* under the law to make a binding and valid contract may in equity be construed as vesting an equitable interest in the other party to that contract, yet to contend that out of a *void* and unauthorized contract it is possible for equities to arise would be to abrogate the protecting power and influence which declares that parties not *sui juris* shall not be able to bind themselves, either in law or equity, by contracts which the law declares they shall not have the power to make. Therefore when Chief Justice Story or any other writer upon the law, or any court, declares that such instruments, though they be informal and inchoate, shall have certain equitable results, it can only

apply to instruments which the law authorized the parties to bind themselves by, for, whatever else may be said or however far the argument may go, after all it depends upon whether or not the conduct of the parties has been such as to estop them from denying the equitable rights which their inchoate and invalid instruments have conferred upon another party; and this incidentally involves the question of whether or not a married woman can be estopped by acts *in pais*. We have shown to the court that the decisions hold a married woman not to be estopped by receiving the purchase-money for property the legal title to which she could not convey to another; and it is submitted that the authorities, without one single discordant note, declare that married women cannot be estopped by any act which is not in itself intentional and fraudulent. Her silence, her assent, her standing by without objection—none of these things estop her; but in order to be estopped from claiming what the law declares is her legal right, either in a court of law or in equity, her conscience must become affected by having done some fraudulent act, by means of which others have been entrapped into dealing with her to their prejudice and loss. When the law declares that a married woman shall not be bound by her contract unless it be in a particular form and evidenced by particular ceremonies, no act of hers, short of fraudulent conduct, can estop her from claiming the protection of that law in whatever forum it is raised. It is further respectfully submitted that the law as to which of two innocent parties shall suffer must necessarily refer to transactions which the party is authorized to make, and cannot by any rule of construction, or the application of any rule or principle of law, be made to apply to the case of an act from the effect of which a married woman is claiming exemp-

tion, which act the law declares she had no power or authority to do, for so to judge would be to deprive her of that protection which the law in its mercy and in its discretion has thrown around her.

IX.

The Equities are with the Plaintiffs.

In 1864, when this property was sold, a war was raging between two sections of the country. It was not known when it would end. The price of real estate in Washington city never was lower, while the sale of it at that time could be of no possible benefit to Mrs. Ransom. She could not then receive the purchase-money, and it was not, as the testimony shows, intended that she should receive it "until the war was over." Undoubtedly, if only her interests, instead of the interests of the other heirs, who desired and probably needed the money, had been consulted, the sale would not have been made. However unintentional it may have been, her interests were sacrificed to raise money for others. When the power of attorney was executed, nearly two years before the war, it was, as Mrs. Gibson testifies, the purpose to sell *at once*. It was presumably never in the contemplation of Mr. and Mrs. Ransom that five or six years afterwards, under circumstances never dreamed of by any of the parties, a sale should be made of their interest, when they could not—possibly for years afterwards, and possibly never—derive any benefit from such sale. If the war had not revoked this power of attorney, certainly, from an equitable standpoint, the uncontemplated change in the relation and situation of the parties should have revoked it, just as marriage and birth of issue revokes a will, and death an agency. There is,

therefore, no obligation—legal, equitable, or moral—upon the heirs of Mrs. Ransom to give up their right to twenty thousand dollars' worth of real estate because at some time in the distant past her then co-tenants, for their benefit and not hers, attempted (it is to be hoped unsuccessfully) to sacrifice her interests for about two hundred dollars, which would be the proportion to the purchase price which the interest in this square bears to her whole interest in the property attempted to be sold. And who is it who disputes their title? Are they *bona fide* purchasers for value without notice? Not at all. They are mere volunteers, one of them tenant by the courtesy, and the others heirs of one who was herself a volunteer—one of the children of Benj. Ogle Tayloe. But it is said John W. Paine has erected valuable improvements; but he did so with notice of our title, and therefore at his peril. If he can show that he made them in good faith, he will be allowed for them; otherwise he ought not to be. As to the payment of the taxes, a tenant in common who is in the enjoyment of the entire property *ought* to pay the entire taxes.

X.

The bill should in no event have been dismissed absolutely, but should have been without prejudice.

Lastly, whatever may be the opinion of the court as to the matters we have discussed, it would seem that there can be no question that the court below erred in dismissing the bill absolutely. In its opinion it was conceded that in a court of law the rights of the parties would be differently adjudicated since we have the legal title, and, we submit, the plaintiffs should not be shut off by the decree from prosecuting what legal rights they may possess.

FRANKLIN H. MACKEY,
Solicitor for Appellants.